United States Court of Appeals

for the Second Circuit

APPELLANT BRIEF REHEARING

77-1062

Pro-Se

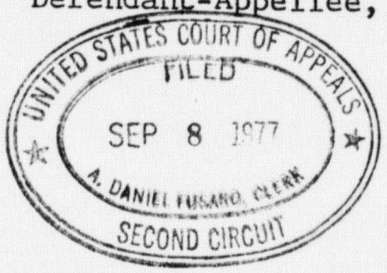
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET No. 77-1062

B

United States of America,

Defendant-Appellee,



v.

Gino Reda,
Luis Reda,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

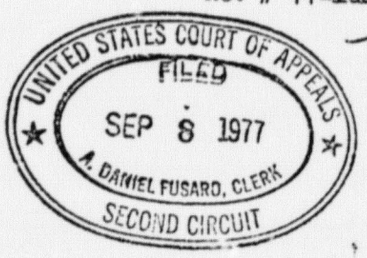
Petition In Support of Rehearing
for appellant Gino Reda

Gino Reda
#03824-158
Box 600
Eglin Air Force Base
Florida 32542

Chadwick case spells out the law citing other cases and decisions which the

United States Court of Appeals
For the Second Circuit

United States of America, Appellee	:	Petition in Support of Re-hearing
v	:	Re: # 77-1062
Gino Reda, Appellant pro se.	:	



77-1062

To The Deputy Clerk:

Dear Sir;

Complying with the Courts request upon notification of the rehearing being granted, August 22, 1977, the appellant submitts the following:

The recent decision rendered by the Supreme Court in the United States v Chadwick is completely within the four corners of this instant case in every respect.

With regard to the search of the box seized at the airport, the particulars of the search are identical in nature, even stronger in favor of the appellant in this instant case as the time element between the seizure and the actual search was four times longer, giving the agents more than ample time to secure the proper warrant for the search as perscribed by law which was never procured, thus making the search per se, unreasonable as the appellants rights under the Fourth Amendment were violated fully. Nor was the search incident to a lawful arrest, the appellant was entitled to the protection of the Warrant Clause of the Fourth Amendment, with the evaluation of a neutral magistrate, before his privacy interests in the contents of the box were invaded. There were no exigent circumstances prevailing at any time as the Government agents had possession of the box at all times after the appellant was placed under arrest untill the time of opening it approximately four and one half hours later, out of the presence of the appellant, thus conducting the search without the safeguards a judicial Warrant provides.

With relation to the search at 1910 Hone Avenue, Bronx, New York, the Chadwick case spells out the law citing other cases and decisions which the Supreme Court has held regarding the necessary particulars relative searches in a home or office and of letters, writings, and documents, such as the appellant has brought about in the following petition, also using many of these same cases in support of his contentions regarding the illegality of this instant case's searches, both at the airport and the home.as well.

I further contend that this Court contradicts itself in this instant case and is in conflict with prior decisions and the law of this Circuit. Supporting these contentions for the appellant are other cases that have been brought before this Court and this Court has sustained petitioners position.

United States v Dzialak, 441 F 2d 212 (C.A. 2nd Cir. 1971).

United States ex rel Nickens v LaValle, 391 F 2d 123 (C.A. 2nd Cir. 1968).

The incidents in these cases have been arguementive and identical to this instant case as cited in my original brief on appeal.

Regarding Point 1.

THE SEALED BOX THAT WAS REMOVED FROM THE APPELLANTS PERSON AT THE AIRPORT.

This search and seizure was not proper as a search incidental to an arrest. This Box was seized without a search warrant, thus invoking the appellants Forth Amendment rights and Fifth Amendment rights against self-incrimination.

This box was also seized from the appellant in one District, and removed to another District. Approximately four (4) hours later, opened and searched by the D.E.A. agents, without their having obtained a search warrant, at a time and place remote from the arrest.

It is the contention of the appellant that the search of this box seized at the Airport at the time of arrest was violative of the appellants Fourth Amendment rights against unreasonable search and seizure.

At the time the appellant was arrested, no probable cause existed to seize or search this box. No search warrant had been obtained with regard to the box or its contents. At the suppression hearing below the Government did not nor could they show exigent circumstances to bring the search into one of the exceptions to warrant requirements.

At the time of his arrest, the appellant was placed into the custody of federal agents and the box physically removed from his possession. Once said box was seized and removed from the appellant there was no danger that the appellant could grab a weapon from it to injure the officers nor could he destroy its contents.

At the time the box was opened and searched in Manhattan, the appellant was not present. No exigent circumstances existed to justify the opening and subsequent search of the box withoub a search warrant. This search was made about 2:00 P.M. with Magistrates readily available to issue warrants. The federal agents who opened and searched the box DID HAVE ample opportunity to apply for a search warrant after seizing the box but failed to do so. Probable cause in itself does not justify a warrantless search and seizure of evidence, since absent exigent circumstances a search warrant must first be obtained from an impartial judicial officer.

State v Spietz, Alaska 1975, 531 P. 2d 521.

United States v Hunt, 336 F. Supp. 172, Supp. Pamph., reversed on other grounds 505 F. 2d 931, certiorari denied 95 S. Ct. 1974.

Although the Fourth Amendment does not prohibit all warrantless searches and seizures, the presumption has always been that a warrant should be obtained whenever practicable. (Per Wright, Circuit Judge, with three Judges concurring and three additional Judges concurring in the judgement.) Zweibon v Mitchell, C.A.D.C. 1975, 516 F. 2d 594.

To prevail on exigent circumstances theory of a warrantless search the Government must establish (1) probable cause for the search and (2) reasonable belief that there is a danger that the contraband will be removed or destroyed.

United States v Ciovacco, D.C. Mass. 1974, 384 F. Supp. 1385, reversed on other grounds 581 F. 2d 29.

The probable cause-exigent circumstances exception to warrant requirements, as with all exceptions to warrant requirements, depends on the reasonableness of the search. Id.

When law enforcement officers have prior knowledge of existence and location of property which he has probable cause to believe is illegally possessed, as well as ample opportunity to obtain judicially sanctioned search warrant, the Fourth Amendment mandates that he follow this procedure.

United States v Sanches, C.A. Ohio 1975, 509 F. 2d 886.

Because only a valid warrant indicates the fullest extent constitutional balance between privacy and law enforcement, an officer must make every reasonable effort to secure a warrant.

Fankboner v Robinson, D.C. Va. 1975, 391 F. Supp. 542.

Since no search warrant was obtained prior to the search of the box and no exigent circumstances existed justifying a search without a warrant, the search of the box was unreasonable and in violation of the appellants Fourth Amendment rights.

The search and seazure and the proposed use of the notes allegedly written by the appellant also violated the appellants Fourth Amendment rights. Further, since the notes are testimonial in nature, their proposed use against the appellant in a criminal proceedure is violative of the appellants Fifth Amendment rights against self-incrimination.

All of these facts are spelled out clearly in the following cases that were also submitted in my brief for argument:

McDonald v United States, 335 U.S. 451, (1948).

Trupiano v United States, (1948), 334 U.S. 669.

United States v Rabinowitz, (1950), 339 U.S. 56.

Rent v United States, 209 F 2d 393 (C.A. 5th. Cir. 1954).

Preston v United States, (1964), 376 U.S. 364.

Chimel v California, (1968), 395 U.S. 752.

United States v Jeffers, 342 U.S. 48, 51.

United States v Free, 437 F 2d 631 (C.A. D.C. Cir. 1970) page 633.

Regarding Point 2.

PROPERTY SEIZED FROM PREMISES 1910 HONE AVENUE, BRONX, NEW YORK.

On August 26, 1976, and on or about 2:30 O'Clock P.M., a search of the premises at 1910 Hone Avenue, Bronx, New York was conducted allegedly pursuant to a valid search warrant. The search warrant issued on August 25th, 1976, described the property to be searched for and seized as " A quantity of cocaine hydrochloride, and other paraphernalia ".

Upon information and belief the aforesaid search was conducted more than twenty four (24) hours after the issuance of the search warrant and in violation of the terms and conditions of said warrant which limited its application to within twenty four hours of its issuance.

Upon information and belief, the federal agents after discovering what is alleged to be cocaine in a samsonite briefcase, continued searching and seized numerous papers, writings, documents and other property alleged to be the appellants and what the Government offered into evidence as belonging to the appellant, thus converting a specific warrant into a general one, or exploratory one which is prohibited and violative of the petitioners Fourth Amendment rights.

Among the articles seized by the federal agents were, a postal scale, the samsonite briefcase, travel brochures, Airlines flight schedules, five hundred dollars ($500.00), shuttle passes, a telephone address book, the contents of a vacume cleaner bag, telephone desk cards, a scale, a notebook with writings, a jar of lactose, a passport in the appellants name, a design for a grave memorial, telephone bills, a pad with writings, a quantity of substance alleged to be marijuana, a vaccination card in the appellants name, cigarette wrappers, a plastic mat from top the refrigerator, and numerous personal papers alleged to be the appellants including a business check book and occupational licenses in the appellants name.

It is clear that substantially all of the items seized by the agents with the exception of the alleged cocaine, WERE NOT particularly described in the search warrant as required by Rule 41 of the Federal Rules of Criminal Proceedure and the Fourth Amendment of the United States Constitution.

With the exception of the quantity of substance alleged to be marijuana, no other property constituted contraband that could have been seized without a search warrant.

The application for the search warrant that issued for the premises at 1910 Hone Avenue does not contain facts sufficient to give probable cause for the issuance of a search warrant.

There is no showing in the application that the cocaine was or had ever been at that address, nor do the affiants allege that the appellant told the agents that it was. The absence of such essential facts setting up probable cause are in conflict with the decision of the United States Supreme Court as in the following cases:

United States v Canestri, 518 F. 2d 269, 273 (2d Cir. 1975).

Spinelli v United States, 393 U.S. 410 (1969).

Aguilar v Texas, 378 U.S. 108, 111 (1964).

Fruits Of The Poisonous Tree Doctrine.

The personal papers and effects the Government contends are the appellants and which the Government had indicated would be used as evidence against the appellant are testimonial in nature and thier seizure against the appellant is violative of the appellants Fifth Amendment rights against self-incrimination.

The law is well settled that Forth Amendment limitations on search and seizures are to be more strictly applied against the Government, when the property seized consists of personal papers, writings and documents belonging to the appellant.

It is clear from the above that the search and seizure of property from the aforementioned premises allegedly pursuant to a search warrant, was unreaspnable and Constitutionally prohibited. The agents proceeded under a search warrant that was narrow in scope. It only authorized the seizure of cocaine hydrochloride and other paraphernalia and a search therefore. After finding what they believed to be the object of the search, the agents began a general search rummaging about the entire apartment. They seized articles and property plainly without the scope of the search warrant and not described therein. Some of the items seized during such unlawful search are testimonial in nature and cannot be used against the appellant without violating his Fifth Amendment rights. Other property seized clearly has no nexus to any crime or has no nexus to the appellant and was seized without the requisite probable cause.

Rule 41 (e) of the Federal Rules of Criminal Proceedure states:

> " A person aggrived by an unlawful search and seizure may move the District Court in which the property was seized for the return of the property and to surpress for use as evidence anything so obtained on the grounds that...(3) the property seized is not described in the warrant... "

part:

> "... and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

In Marron v United States, 275 U.S. 192, 196 (1927) the Supreme Court held that the Fourth Amendment meant:

> " The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is taken, nothing is left to the discretion of the officer executing the warrant..."

The above language from Marron has been cited with the approval by the Supreme Court and reaffirmed on various occasions. See: Stanford v Texas, 379 U.S. 476 (1964); Stanley v Georgia, 349 U.S. 557 (1968); Berger v New York, 338 U.S. 41 (1967).

In United States v Dzialak, 441 F. 2d 212 (C.A. 2nd. Cir. 1971) This Court reversed a conviction based on evidence seized pursuant to a search warrant containing insufficient particularization. The Court held that such seizure violated the Constitutional requirements that search warrants must particularly set forth that which is to be seized.

In United States ex rel Nickens v LaValle, 391 F. 2d 123 (C.A. 2d Cir. 1968) this Court rejected arguments that Warden V. Hayden, 387 U.S. 294 conferred discretion on officers to seize property as evidence though not particularly described in the search warrant. The Court in rejecting such argument held that the Marron case (Supra) specifically prohibited the seizure pursuant to a search warrant, of any evidence not particularly described in the warrant.

In the instant matter, it is clear that all property not described in the warrant must be suppressed as evidence against the appellant. This is especially so where as here, most of the property seized after the object of the search warrant was located and seized. United States v Highfill, 334 F. Supp. 700 (D.C. Ark. 1971). See also: United States v Baldwin, 46 F.R.D. 63 (1969); and United States v Spallino, 24 F. 2d 567.

A search warrant must not only describe with reasonable specifics the items to be seized but must limit the search to those places where the items sought are likely to be found, and must require that a list of the items seized be handed over to the authorizing magistrate. United States v Rogers, D.C. Va. 1975, 388 F. Supp. 298.

Requirements that a search warrant shall particularly describe place to be searched and person or things to be seized was designed to make a general search impossible by preventing seizure of one thing under a warrant describing another. State v Joseph, R.I. 1975, 388 F. Supp. 298.

Based upon the foregoing facts, our Constitutional Laws, Supreme Court decisions, and the law of this and other Circuits, the appallent prays that this case be reversed on all points in the furtherence of justice.

Respectfully Submitted,

Gino Reda

GINO REDA, appellant pro se.
03824-158
Box 600
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Florida 32542

DATED:

September 5, 1977.

1. United States v Chadwick, decided June 21, 1977.

2. Boyde v United States, 116 U.S. 616 (1886).

3. United States v Dzialak, 442 F. 2d 212 (C.A. 2nd. Cir. 1971).

4. U.S. ex rel Nickens v LaValle, 391 F. 2d 123.(C.A. 2nd. Cir. 1968).

5. Katz v United States, 398 U.S. 347, 351 (1967).

6. U.S. v Sanches, C.A. Ohio 1975, 509 F2d 886.

7. Chimel v California, 395 U.S. at 763.

8. Preston v U.S., 376 U.S. at 367.

9. State v Spietz, Alaska 1975, 531 P.2d 521.

10. U.S. v Hunt, 336 F. Supp. 172, Supp Pamph., 505 F.2d 931, 95 S. CT. 1974.

11. Zweibon v Mitchell, C.A.D.C. 1975, 516 F.2d 549.

12. U.S. v Ciovacco, D.C. Mass. 1974, 384 F.Supp. 1385, 581 F.2d 29.

13. Fankboner v Robinson, D.C.VA.1975, 391 F.SUPP. 542.

14. McDonald v United States, 335 U.S. 451, (1948).

15. Trupiano v United States, (1948), 334 U.S. 669.

16. Rent v United States, 209 F. 2d 393 (C.A. 5th. Cir. 1954).

17. United States v Jeffers, 342 U.S. 48, 51.

18. United States v Free, 437 F. 2d 631 (C.A. D.C. Cir. 1970) page 633.

19. United States v Rabinowitz, 339 U.S. 56, 68 (1950), (Frankfurter, J., dissenting).

20. Cooper v California, 386 U.S. 58 (1967).

21. Johnson v United States, 333 U.S. 10, 14 (1948).

22. Camara v Municipal Court, 387 U.S. 523, 532 (1967).

23. Ex part Jackson, 96 U.S. 727, 733 (1878).

24. United States v Leevwen, 397 U.S. 249 (1970).

25. United States v Canestri, 518 F. 2d 269, 273 (2d Cir. 1975).

26. Spinelli v United States, 393 U.S. 410 (1969).

27. Aguilar v Texas, 378 U.S. 108, 111 (1964).

28. Marron v United States, 275 U.S. 192, 196 (1927).

29. Stanford v Texas, 379 U.S. 476 (1964).

30. Stanley v Georgia, 349 U.S. 557 (1968).

31. Berger v New York, 338 U.S. 41 (1967).

32. United States v Highfill, 334 F. Supp. 700 (D.K. Ark. 1971).

33. United States v Baldwin, 46 F.R.D. 63 (1969).

34. United States v Spallino, 24 F. 2d 567.